STATE OF MICHIGAN

COURT OF APPEALS

HANTZ FINANCIAL SERVICES, INC., Plaintiff-Appellant,	UNPUBLISHED January 24, 2012
v	No. 301924 Midland Circuit Court
WILLIAM HENRY MONROE II, BARBARA SUSAN MONROE, WILLIAM HENRY MONROE III, and CHRISTOPHER GRIFFITH MONROE, Defendants-Appellees.	LC No. 10-006870-CZ

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In this dispute over the arbitration of negligent supervision and fraud claims, plaintiff Hantz Financial Services, Inc. appeals by right the circuit court's opinion and order granting defendants' motion for summary disposition and denying Hantz Financial's motion for summary disposition. Because we conclude that there were no errors warranting relief, we affirm.

Michael Laursen was a financial planner and part owner of Hantz Financial. Laursen engaged in a long-term embezzlement scheme by which he defrauded his customers, including defendants. Instead of investing defendants' funds, which amounted to nearly $500,000, Laursen deposited the checks into his personal account and then provided defendants with regular, fraudulent account statements. While defendants did not deliver any funds to Laursen after May 2003, Laursen continued to send them fabricated account statements as late as 2007.

Laursen's embezzlement came to light in March 2008 and he committed suicide just days later. Hantz Financial conducted a meeting with Laursen's former clients, including defendants, on March 18, 2009. At the meeting, Hantz Financial allegedly assured the investors that it would reimburse all their losses. Hantz Financial ultimately reimbursed all Laursen's former clients except defendants.

Defendants filed a statement of claim with the Financial Industry Regulatory Authority and demanded arbitration. Hantz Financial answered in part that the Authority did not have the power to arbitrate the dispute under the Authority's Rule 12206. The arbitration panel concluded otherwise. The panel did not directly address Hantz Financial's argument that the claims were also barred under former MCL 451.810(e), which provided a period of limitations that has since

been repealed. The arbitration panel then awarded defendants almost $600,000 in damages, costs, and lawyer's fees. Following the award, the circuit court denied Hantz Financial's motion to dismiss the arbitration award on grounds that the arbitration panel erred when it determined that defendants' claims were eligible for arbitration under Rule 12206. Further, it declined to upset the arbitration panel's implicit decision that MCL 451.810(e) did not bar defendants' claims.

Hantz Financial first argues that the lower court erred by affirming the arbitration panel's conclusion that defendants' claim was eligible for arbitration. This Court's review of arbitration awards is quite limited. *Dohanyos v Detrex Corp*, 217 Mich App 171, 174-175; 550 NW2d 608 (1996). Nevertheless, this Court will vacate an arbitration award where, in relevant part, the arbitrator exceeded his or her powers. See MCR 3.602(J)(2)(c). It is well-settled that an arbitrator can exceed the authority granted under an arbitration agreement by making an award that is unlawful: "The Michigan judiciary is not a procedural bureaucracy which may, by agreement of private disputants, be used to validate patently erroneous arbitration awards as a trade-off for docket relief and speedy, inexpensive, and unreviewable dispute resolution." *DAIIE v Gavin*, 416 Mich 407, 433; 331 NW2d 418 (1982). As such, the courts retain the authority to review an award "to determine whether the award rests upon an error of law of such materiality that it can be said that the arbitrators 'exceeded their powers.'" *Id.* However, this review is limited to errors that appear on the face of the award. *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009). This Court may not review the arbitrator's factual findings—or lack thereof—in determining whether the award was unlawful. *Gavin*, 416 Mich at 429. Thus, the award shall be set aside only if "it clearly appears on the face of the award or the reasons for the decision as stated, being substantially part of the award, that the arbitrators through an error of law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made[.]" *Id*. at 443 (citation omitted).

Under Rule 12206(a), the Authority does not have the power to arbitrate claims "where six years have elapsed from the occurrence or event giving rise to the claim." However, it is for the arbitration panel to "resolve any questions regarding the eligibility of a claim under" Rule 12206(a). In *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 85; 123 S Ct 588; 154 L Ed 2d 491 (2002), the United States Supreme Court held that the "applicability of the [National Association of Securities Dealers] time limit rule is a matter presumptively for the arbitrator, not for the judge." The rule addressed in *Howsam* is identical in substance to the Authority's Rule 12206(a).

Hantz Financial argues that defendants' claims are ineligible for arbitration under Rule 12206(a) for two reasons. First, it asserts that the date of the "occurrence or event giving rise to the claim" is the date of investment, which in this case was more than six years prior to the date defendants submitted their claim. In support of this argument, Hantz Financial relies heavily on this Court's decision in *Chubb Securities Corp v Manning*, 224 Mich App 702; 569 NW2d 886 (1997). In *Chubb*, this Court held that the eligibility period for an arbitration claim began to run at the time the investment purchases were made, and that "the date of the occurrence or event does not under any circumstances depend on the date when the aggrieved investor first discovers that he or she has suffered financial loss." *Id*. at 708 (citation omitted). *Chubb*, however, has since been distinguished.

In *Todorov v Alexander*, 236 Mich App 464; 600 NW2d 418 (1999), citing *Osler v Ware*, 114 F3d 91 (CA 6, 1997), this Court determined that rule stated in *Chubb* did not apply to the facts of its case:

> In addressing the issue of § 15 of the NASD Code in *Chubb*, this Court was not faced with a situation where the plaintiff claimed damages resulting from acts that occurred after the initial investment. This Court addressed only whether § 15 was a statute of limitations subject to equitable tolling on the basis of a claim of fraudulent concealment where the investor claimed only that she had been fraudulently induced into making certain investments. Following federal precedent, this Court held that it was not. The United States Court of Appeals for the Sixth Circuit, however, has specifically addressed whether the date of initial investment is always the "occurrence or event" that gives rise to a party's claim, thus triggering the eligibility period. [*Todorov*, 236 Mich App at 467-468.]

In *Todorov*, the plaintiff alleged that the defendants "filed false periodic account statements misrepresenting the value of his account and investments" and that the defendants "churned" the account (excessively bought and sold to generate commissions). *Id.* at 466. The *Todorov* Court concluded that these events might have given rise to a cause of action triggered after the initial investment. *Id.* at 468-469. Moreover, in *First of Michigan Corp v Trudeau*, 237 Mich App 445; 603 NW2d 116 (1999), an investors' claim was deemed eligible under an identical rule where the investments were made more than six years before the arbitration demand, but the broker subsequently issued inaccurate financial statements. The Court explained that the "postinvestment claims regarding the misrepresentation of the value of the investor's portfolio is a separate 'event giving rise to' a new claim, thereby triggering a new six-year eligibility period." *Id.* at 448. Similar to this case, the investor seeking arbitration was alleging wrongful acts that occurred after the date of the initial investment, such as bogus account statements and fraudulent misrepresentations. Thus, there is no merit to Hantz Financial's assertion that it is an obvious error of law to hold that the date of an "occurrence or event" under Rule 12206 is anything other than the date of investment. The panel did not fail to apply controlling law when it declined to apply the rule in *Chubb* to the facts of this case.

Hantz Financial also alleges that, even if the date of the "occurrence or event" is not necessarily the date of investment, defendants' claims are still ineligible for arbitration under Rule 12206(a) because none of the alleged wrongful conduct that occurred after the date of investment was the proximate cause of defendants' damages. This argument disregards the fact that defendants' may have been damaged by their inability to discover Laursen's embezzlement scheme at an earlier date. In the absence of the fraudulent account statements and the negligent supervision, defendants could have discovered the embezzlement sooner and taken ameliorative steps such as filing an earlier statement of claim, employing alternative investment strategies, or even taking steps to account for their decreased retirement savings. Instead, defendants operated under the assumption that they had assets in excess of $1,000,000, and relied on that assumption to their detriment.

This argument also omits any mention of the fact, undisputed at the arbitration hearing and oral arguments before the circuit court, that Hantz Financial verbally assured defendants that all of their losses would be reimbursed. These assurances were made in March 2009, 52 days before the May 2009 deadline that Hantz Financial asserts should control under Rule 12206. The record shows that defendants relied on these assurances, and did not file a claim until discovering that Hantz Financial had reimbursed all of Laursen's victims with the exception of them. If Hantz Financial were correct about the May 2009 deadline, and defendants missed that deadline due to their reliance on Hantz Financial's assurances, then the arbitration panel would not have been unjustified in finding that Hantz Financial's post-investment actions were sufficient to support defendants' arbitration award. Notably, the circuit court pointed out that the arbitration award did not state that the award was based on the initial investment.

The arbitration panel did not exceed its authority when it determined that defendants' claims were not barred under Rule 12206(a).

Next, Hantz Financial argues that defendants' claims were barred under MCL 451.810(e), which provides that a person "may not bring an action under subsection (a)(2) more than 2 years after the person, in the exercise of reasonable care, knew or should have known of the untruth or omission, but in no event more than 4 years after the contract of sale." When Hantz Financial raised this defense to the arbitration panel, defendants argued that Hantz Financial waived the claim by failing to timely raise it. In making its award, the arbitration panel listed Hantz Financial's affirmative defenses, but did not list this defense. As such, the arbitration panel might have agreed with defendants and determined that Hantz Financial waived this defense by failing to timely raise it. The arbitration panel clearly had the authority to deem an untimely defense waived. See Rule 12308(b). Accordingly, we are unable to say that, on the face of the award, the decision not to consider this defense amounted to an error of law. *Washington*, 283 Mich App at 672.

There were no errors warranting relief from the arbitration panel's award.

Affirmed. As the prevailing parties, defendants may tax their costs. MCR 7.219(A).

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly